Filed 2/11/09 P. v. Martinez CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. VINCENT JOSE MARTINEZ, Defendant and Appellant.	B205313 (Los Angeles County Super. Ct. No. TA089484)

APPEAL from a judgment of the Superior Court of Los Angeles County. John T. Doyle, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Sarah J. Farhat and Rama R. Moline, Deputy Attorneys General, for Plaintiff and Respondent.

Vincent Martinez was convicted of attempted second degree robbery (Pen. Code,[1] § 664, 211), with the allegation found true that a principal in the offense was armed with a firearm (§ 12022, subd. (a)(1)). Martinez appeals. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 21, 2007, Martinez and another man, Jacob Lopez, entered a Lynwood restaurant. Lopez pointed a gun at the restaurant's owner, Jose Padilla, and demanded money; Martinez stood next to him. Padilla said he would comply but instead pulled a gun from his waistband. Martinez and Lopez fled, and Padilla noticed that Martinez limped as he ran. Martinez and Lopez entered a car; Padilla fired two shots at the car as it drove away.

Police recovered a car that looked like the one in which Martinez and Lopez left the scene. It had a small, indented hole in the rear and the rear window was smashed out. Approximately one week later, Padilla identified Lopez from a photographic lineup as the assailant with a gun. The following day, he identified Martinez from a photographic lineup as the other robber.

Martinez was charged with attempted second degree robbery, with the allegation that a principal in the offense was armed with a firearm. His first trial ended in a deadlocked jury and a mistrial.

On retrial, Padilla identified him in court as one of the robbers. Martinez was convicted as charged, with the firearm enhancement found true. He was placed on probation for 36 months and ordered to serve 270 days in county jail. Martinez appeals.

---

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

DISCUSSION

I. Sufficiency of the Evidence

A. Padilla's Testimony

Martinez argues that Padilla's testimony was "so indecisive, contradictory, nonsensical, and hence untrustworthy as to far outweigh any conditional identification of appellant in a six-pack photographic line-up, or at trial," and that it was unreliable and legally insufficient to support the conviction. "When a jury's verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury." (*People v. Brown* (1984) 150 Cal.App.3d 968, 970.) We review the record in the light most favorable to the judgment and determine whether it discloses substantial evidence such that a rational trier of fact could find Martinez guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

We conclude that the evidence is sufficient to sustain Martinez's conviction. Padilla identified Martinez as the assailant without the gun from a photographic lineup within one week of the incident. At trial, Padilla identified Martinez as one of the men who came into his restaurant and attempted to rob him. He accurately described Martinez as walking with a limp. Padilla again identified the photograph of Martinez from the photographic lineup as Martinez, although he also erroneously identified the photograph of Lopez as a photograph of Martinez. Corroborating Padilla's testimony was evidence that Martinez and Lopez had lived together, that the car that the men used in the incident was owned by Martinez's brother and was recovered from Martinez's sister's driveway with damage consistent with the shots Padilla fired.

Martinez identifies some respects in which Padilla's testimony at the second trial differed from his initial police report and his testimony in the first trial, and particularly focuses on Padilla's mistaken identification of both defendants as Martinez at trial. These discrepancies were addressed extensively at trial, and the jury clearly concluded that Padilla's testimony was believable. "[W]hen the circumstances surrounding the identification and its weight are explored at length at trial, where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court." (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.)

The differences in Padilla's accounts over time do not demonstrate that his testimony was physically impossible or inherently improbable. (*People v. Perez* (1967) 65 Cal.2d 709, 713; *People v. Bryant* (1958) 157 Cal.App.2d 528, 535 [where there is direct testimony that the defendant committed the crime, he must show that the testimony is inherently unbelievable to prevail on appeal].) In the absence of such a showing, the testimony of a single witness, if believed by the trier or fact, is sufficient to sustain a conviction. (*Perez*, at p. 713; *Bryant*, at p. 535; Evid. Code, § 411.) Though the jury might reasonably have concluded that Padilla's testimony and identification was unreliable, when the circumstances reasonably justify the jury's findings, we may not reverse the judgment merely because the circumstances might also support a contrary finding. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

B. Aiding and Abetting Theory

Martinez argues that the evidence was sufficient only to show that he was present while Lopez attempted to rob Padilla, not that he aided and abetted the attempted robbery. Here again, our review of the judgment is limited to the determination of whether "there is any substantial evidence, contradicted or uncontradicted, which will support it . . . ." (*People v. Brown*, *supra*, 150 Cal.App.3d at p. 970.)

The evidence is sufficient to support a conviction on an aiding and abetting theory. Martinez and Lopez entered the restaurant together with Lopez already carrying a gun at

the time of entry. Martinez stood next to Lopez while Lopez demanded money, and he fled the scene with Lopez when Padilla pulled out his gun. The men used the same getaway car. This evidence permitted the jury to conclude beyond a reasonable doubt that Padilla knew of Lopez's criminal purpose and acted intentionally to facilitate that criminal purpose. The jury could reasonably have concluded that Padilla was present to encourage, support, or back up Lopez and to increase the probability of success of the robbery of three victims in the restaurant by increasing the number of assailants. The jury could also conclude that this was a planned joint venture based on the men's mutual flight to a waiting vehicle. These factors are properly considered in determining whether a party aided and abetted. (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5 [may consider presence at the scene of the crime, companionship, and conduct before and after the offense].) Sufficient evidence supported Martinez's conviction. (See *ibid*. [evidence sufficient to support conviction on aiding and abetting theory where appellant and perpetrator approached victim together, appellant stood and watched while armed perpetrator demanded money from victim, and appellant left with perpetrator].)

II. Prosecutorial Misconduct

Martinez argues that the prosecutor committed misconduct by arguing that "appellant's mere presence constituted aiding and abetting," and that this argument shifted the burden of proof; he also contends that the prosecutor argued facts not supported by the evidence.

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or

reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).)

Martinez neither objected to the prosecutor's statements nor requested a jury admonition concerning the conduct he complains of on appeal. To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely objection, make known the basis of the objection, and ask the trial court to admonish the jury. (*Hill*, *supra*, 17 Cal.4th at p. 820.) Unless the prosecutor's misconduct could not have been cured by admonition, the defendant must object to the alleged misconduct at trial. The evidence here does not establish that an admonition would have been insufficient to remedy any misconduct. Martinez has therefore failed to preserve his claims. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

Martinez acknowledges that he failed to object to the alleged misconduct and contends that his counsel's failure to object at trial constituted ineffective assistance of counsel within the meaning of *Strickland v. Washington* (1984) 466 U.S. 668. To establish ineffective assistance of counsel, Martinez must demonstrate that "(1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner." (*In re Neely* (1993) 6 Cal.4th 901, 908.) Because Martinez claims ineffectiveness of counsel, we consider the alleged misconduct despite the failure to object in the trial court.

A. Presence at the Scene

The first sentence of which Martinez complains was the sentence, "Defendant is guilty of the crime as an aider and abettor if you find he was there." Martinez claims this is not the law. We think that the sentence, read in context, makes clear what the prosecutor was arguing. While the sentence was inartfully composed, the prosecutor's argument in its entirety is an exhortation to conclude that Martinez was an aider and

abettor because of what happened, not on the basis of his presence. The language of the pertinent portion of closing argument makes this clear: "The defendant intended to commit the robbery. Now, how do we know that they wanted to rob the place? Well, we know that Jacob Lopez wanted to rob the place. How do you know the defendant shared his intent? Well, he goes into the La Playita. And on cross examination, it came out at the time of closing or closing up, he goes in with Jacob Lopez who has a gun. He arrived with him. We know they came in together for one, and they leave in the same car together after the crime. They came together because they left together. You can infer that. Go in at the same time as the robber. Standing there with the robber while the robber pulls out a gun and then you leave with the robber, run away with the robber, and get away with the robber. Did he have the same intent as Jacob Lopez? Of course he did. This is where we use one of those fabulous legal terms. Duh. How do you know? It's a lot of language in these jury instructions, but this is—when you think of a robbery, this is what you think of. Give me your money. It's what it is. And did he intend to help him? Yeah. He's standing right there with him, and he came in with him. And he left with him. How do you know he was part of the robbery? Duh? Common sense.

"Now, what is an aider and abettor[?] Directly commit the crime. You can aid and abet someone else who committed the crime. And you're equally guilty whether you personally do it or you aid someone. To be an aider and abettor, somebody has to commit the crime or the attempted crime. Here, Jacob Lopez is using a gun. He knew he intended to commit the crime, came in with him, stayed with him, left with him. Defendant intended to aid and abet the perpetrator in committing the crime and did in fact aid and abet the perpetrator in committing the crime and did in fact aid and abet the commission of the crime. While standing near someone while they rob them. Could be a lookout. Could be backup in case something happens. Well, wasn't prepared to handle what did happen. But in case something less than that happened, he was there. He was ready. Moral support. Something like that. He didn't have the gun, but he was ready. And how do you know he had the intent? Common sense. Two men went in to rob that place, and they were thwarted by Mr. Padilla.

"I asked in jury selection, you know, about the Lakers. And the juror's gone now. In this crime[,] Jacob Lopez[,] he's Kobe. He's Shaq back in the day. He gets a ring for this crime. Defendant is Mark Madsen. He's there. He's ready to come in the game if he needs to. Come off the bench. But at the end of the day, he gets a ring. At the end of the day if you're part of it, everybody gets a ring.

"Defendant is guilty of the crime as an aider and abettor if you find he was there."

Martinez isolates the final sentence as though it were the prosecutor's complete representation of the applicable law, but this is not the case. As the full argument makes clear, the prosecution devoted substantial argument to why the jury should conclude that Martinez aided and abetted Lopez. What it appears the prosecutor meant was that the person who participated with Lopez in the attempted robbery was an aider and abettor, so the real question was identity: if the jury believed that Martinez was in fact the person who accompanied Lopez—identification being a central issue in this case—then the jury should conclude, for the reasons just argued at length, that he was guilty on an aiding and abetting theory. Placed in context, the sentence on which Martinez relies as misconduct simply is not susceptible of the interpretation Martinez places upon it, and a reasonable juror would not have understood it in the manner Martinez argues. There was no misconduct here. (*People v. Benson* (1990) 52 Cal.3d 754, 793 [prosecutor's argument is not objectionable if it would not have been understood by a reasonable juror to state or imply anything harmful].)

B. Use of Word "They"

Martinez next complains of the use of the word "they" in closing argument, asserting that the prosecutor's attempt to link Martinez and Lopez was inaccurate and unsupported by the evidence.

Martinez claims that the prosecution's argument that the men arrived at the restaurant together was "not based on reasonable inference, but on speculation and imagination" because there was no evidence concerning how, when, or with whom he

arrived at the restaurant. We disagree. The prosecutor was entitled to argue the reasonable inference that Martinez and Lopez arrived together because of the evidence that they entered the restaurant together, fled together, and entered a car together after the attempted robbery went awry. (*People v. Bonilla* (2007) 41 Cal.4th 313, 336-337 [prosecutor has wide latitude at closing argument to comment on the evidence and reasonable inferences that may be drawn from the evidence].)

Martinez then argues that the argument concerning whether there was a direct but ineffective step toward committing the robbery was improper because the prosecutor said, "Well, they pull out the gun, try to get it, get the money, and they probably would have done it if it hadn't been someone else than Jose Padilla that night because he pulled out his own gun at them. He pulled out his gun. They said, oh, shoot, ran." According to Martinez, this was misconduct because there was no evidence that Martinez pulled out a gun or that he said, "Oh, shoot." In fact, the evidence was that Lopez held the gun and that he shouted "Oh, shit" when Padilla revealed his weapon.

Here again, Martinez focuses on a few words at the expense of the meaning of the prosecutor's argument. The prosecutor was very clear to note several times that Lopez was the one holding the gun. He said, "You'll see if they went far enough to commit an attempted robbery. They took a direct but ineffective step towards committing a robbery. . . . For the moment right now focus on Jacob Lopez and what he did. Because he's the primary person with the gun making the threats." Then, listing the elements of robbery, the prosecutor continued, "What do we have? Direct but ineffective step. Jacob Lopez enters La Playita with a gun and demanded money, property." Then, immediately after the sentences of which Martinez complains, the prosecutor again emphasized that the jury can infer that Martinez shared Lopez's intent because "he goes in with Jacob Lopez who has a gun." Shortly thereafter, the prosecutor again stated, "Here, Jacob Lopez is using a gun." The prosecutor emphasized the reasonableness of the inference that the two men were operating together and shared the same intent to commit robbery, a reasonable inference based on the evidence before the jury. We perceive no reasonable likelihood that the jury would have understood the prosecutor's argument as an attempt to

argue to the jury that Martinez held the gun and find no misconduct on this ground. (*People v. Benson*, *supra*, 52 Cal.3d at p. 793.)

As far as who, if anyone, said, "oh, shoot," when Padilla unexpectedly confronted them with his own weapon, there was nothing improper here. In the conversational and casual language that is frequently adopted by counsel when arguing to the jury, the prosecutor used the word "they" when the evidence was that Lopez was the only one who spoke. In light of the men's entrance together, their unified front as Lopez demanded money, and their joint flight with the same exit route to the same car, it is hardly an unreasonable inference to attribute that both men were surprised by Padilla drawing his own weapon. Even to the extent that the argument was technically inaccurate—Lopez apparently did not say, "Oh, shoot," but uttered an expletive instead, and Martinez did not speak—it is inconceivable that this inaccuracy was prejudicial in any respect. (*People v. Benson*, *supra*, 52 Cal.3d at p. 793.) There was no misconduct here.

III. CALCRIM No. 300

CALCRIM No. 300 provides, "Neither side is required to call all witnesses who may have information about the case or to produce all physical evidence that might be relevant." Martinez argues that the instruction suggests to the jury that the defendant, while not required to produce all evidence or witnesses, is required to produce some evidence or call some witnesses. Martinez acknowledges that this argument has been rejected in *People v. Anderson* (2007) 152 Cal.App.4th 919, *People v. Ibarra* (2007) 156 Cal.App.4th 1174, and *People v. Felix* (2008) 160 Cal.App.4th 849. We agree with those courts that CALCRIM No. 300 accurately states the law, and that in light of other instructions advising the jury of the defendant's absolute constitutional right not to testify and to rely on the state of the evidence, as well as the presumption of innocence and the burden of proof, there is no reasonable likelihood that the jury misunderstood the instruction in the manner that Martinez suggests.

IV. CALCRIM No. 318

CALCRIM No. 318 advises the jury that statements made by a witness before the trial may be used in two ways: to evaluate the witness's credibility and as evidence that the information in the earlier statements is true. Martinez argues that the second use permitted by CALCRIM No. 318 creates an improper presumption that a witness's unsworn, out-of-court statements are both true and deserving of greater belief than statements made in court under penalty of perjury. We do not read such a presumption into the instruction. CALCRIM No. 318 does not compel the jury to use the statement in either of the two stated ways, it simply conveys that these are the two purposes for which a witness's pretrial statements may be considered by the jury. The instruction creates no presumption of truthfulness, nor does it speak in any way to how much credence such statements deserve in comparison with sworn testimony. Particularly when considered with CALCRIM No. 220, which informs the jury of its obligation to consider all evidence received at trial, the instruction properly guides the jury in the use of witness testimony, and did not encourage the jury to neglect or ignore trial testimony in favor of out-of-court statements. (*People v. Felix*, *supra*, 160 Cal.App.4th at p. 859; see also *People v. Anderson*, *supra*, 152 Cal.App.4th at p. 940.)

V. CALCRIM No. 400

Martinez asserts two errors in CALCRIM No. 400: that it instructs the jury that one of the defendants was the perpetrator of the crime and that it uses the language "equally guilty." Martinez's arguments have no merit.

Martinez first complains of an unnecessarily accusatory tone in the description of aider and abettor liability. As given, CALCRIM No. 400 provided that a person may be guilty of a crime in two ways: by directly committing the crime or by aiding and abetting "someone else who committed the crime." Martinez contends that the instruction

instructed the jury that at least one of the defendants was the perpetrator, but the instruction cannot reasonably be construed in that manner. This argument ignores the language in CALCRIM No. 401, also given here, that informs the jury that the prosecution must prove that "[t]he perpetrator committed the crime."

The instruction properly provides that in order to convict a person on an aiding and abetting theory, the jury must determine that the defendant aided and abetted another person who committed the crime. In conjunction with CALCRIM No. 401, the instructions inform the jury that the prosecution must prove that the defendant knew the perpetrator intended to commit the crime, acted with the intent to aid the perpetrator, and did, in fact, aid the perpetrator in the commission of the crime. The instructions correctly instruct the jury on the law. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.)

According to Martinez, the language of the instruction should instead be amended to read, "someone else who may have committed the crime." The instruction would then instruct a jury that a defendant could be found guilty of a crime on an aiding and abetting theory *without determining* that the perpetrator actually committed the crime. Such a revision would be catastrophically contrary to the law on aiding and abetting. (*People v. Perez* (2005) 35 Cal.4th 1219, 1225 ["for a defendant to be found guilty under an aiding and abetting theory, someone other than the defendant must be proven to have attempted or committed a crime; i.e., absent proof of a predicate offense, conviction on an aiding and abetting theory cannot be sustained"].)

Martinez's second complaint about CALCRIM No. 400 is that it states that "A person is equally guilty of the crime whether he committed it personally or aided and abetted the perpetrator who committed it." Martinez argues that in certain instances, an aider and abettor may be found guilty of a lesser offense than the perpetrator, so this assertion is an inaccurate statement of the law. The instruction accurately states the law. An aider and abettor "shares the guilt of the actual perpetrator." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 259.)

VI. *Guiton* Error

Martinez refashions his prosecutorial misconduct argument to allege that the prosecutor's statement, "Defendant is guilty of the crime as an aider and abettor if you find he was there," constituted a legally incorrect theory of guilt that requires reversal under *People v. Guiton* (1993) 4 Cal.4th 1116, 1122. As discussed above in the context of the prosecutorial misconduct argument, we disagree with Martinez's premise that the prosecutor argued that a conviction could be based on the defendant's mere presence at the scene. Reading the full argument, it is apparent that the jury was not instructed with a legally incorrect theory of guilt based on Martinez's presence at the scene of the crime. Moreover, CALJIC Nos. 400 and 401 adequately instruct the jury as to the legal requirements for a conviction on an aiding and abetting theory, and make clear that presence at the scene of the crime may be considered but is not itself sufficient to prove a person aided and abetted a crime. There was no *Guiton* error here.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

ZELON, J.

We concur:

PERLUSS, P. J. WOODS, J.